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| Response Form to the Consultation Paper on the clearing and derivative trading obligations in view of the benchmark transition |
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**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **2 September 2021.**

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION \_RFRS\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_RFRS\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_RFRS\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open Consultations” -> Consultation Paper on the clearing and derivative trading obligations in view of the benchmark transition”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from counterparties of OTC derivatives transactions which are subject to the clearing obligation or to the derivative trading obligation as well as from CCPs and Trading Venues.

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**General information about respondent**

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| Name of the company / organisation | European Banking Federation and Internationals Swaps and Derivatives Association |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Global / European |

**Questions**

**General comments**

1. **: Are there any general comments you would need to raise?**

<ESMA\_QUESTION\_RFRS\_1>

The International Swaps and Derivatives Association (**ISDA**), European Banking Federation (**EBF**) and their members are supportive of the regulators’ efforts on LIBOR transition and agree that such transition results in necessary changes to the derivatives clearing and trading obligations. We are also supportive of the proposals being developed by the EU to support the market in the transition away from LIBOR and EONIA but would, as always, encourage global co-ordination and alignment wherever possible. In particular, given we understand the CFTC has not yet made a decision on whether (or when) SOFR swaps should be brought within the clearing or trading obligations in the jurisdiction where the majority of SOFR swaps are traded, we would suggest the EU should not bring in such obligations unless and until the US mandates the same. We note that the international nature of the swaps market means that obligations introduced in one jurisdiction can, indirectly, force entities in other jurisdictions to comply before their home jurisdiction mandates similar rules.

We note that there are already significant commercial and risk-management incentives to market participants to clear OTC derivatives where possible and to execute eligible products on-venue, and we are already seeing liquidity develop in RFR linked derivatives. As a result, we consider that it should be possible to monitor the developing liquidity in these products and introduce mandatory clearing and venue trading at an appropriate time, taking into account the principles of proportionality and the potential burden on market participants of introducing new obligations at a time when they are also seeking to manage significant additional regulatory changes. Allowing for an appropriate phase-in of these obligations should not result in an increased risk to EU markets.

We also consider that transactions stemming from Post Trade Risk Reduction (PTRR) exercises should be exempt from the CO, to enable market participants to manage the risk in their uncleared portfolios. We appreciate that the European Commission would need to take steps to implement any formal exemption from the clearing mandate applying to RFR swaps in the case of trades resulting from PTRR exercises (such as multilateral risk rebalancing cycles, which reduce uncleared counterparty credit risk and/or shift existing risk from the uncleared space to CCPs). However, we would ask ESMA to bear in mind, when introducing new products to the CO, that PTRR exercises are a key tool in managing LIBOR transition. With the extension of the clearing obligations to RFR swaps, such risk management practices, currently undertaken by many large dealer banks, could be impaired, as OIS as a tradeable instrument for both cleared and uncleared interest rate risk would no longer be available.

Reducing risk in uncleared portfolios is very beneficial in volatile markets such as those experienced in March 2020. Large market moves will cause large liquidity requirements for market participants if they are not able to manage the risk in their bilateral portfolios.

**About ISDA**

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 960 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on [Twitter](https://twitter.com/isda), [LinkedIn](https://www.linkedin.com/company/isda), [Facebook](https://www.facebook.com/ISDA.org/) and [YouTube](https://www.youtube.com/channel/UCg5freZEYaKSWfdtH-0gsxg).

**About EBF**

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international – while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.

<ESMA\_QUESTION\_RFRS\_1>

**State of progress with the transition**

1. **: Are there any other aspects of the transition that need to be taken into account? Please share any data that would help qualify further the progress with the transition or any other aspects that you think should be considered.**

<ESMA\_QUESTION\_RFRS\_2>

N/A

<ESMA\_QUESTION\_RFRS\_2>

**General approach**

1. **: Are there any other aspects that you think that ESMA should take into account or that might justify a different approach?**

<ESMA\_QUESTION\_RFRS\_3>

We strongly support ESMA's approach of considering both the CO and the DTO at the same time in this Consultation. As we have mentioned in responses to previous consultations, ISDA supports alignment of the CO and DTO to ensure that changes made to one obligation are reflected as appropriate in the other (particularly with respect to removing products from the scope of these obligations). In addition, similar issues are likely to be relevant with respect to LIBOR transition and its impact on both the CO and the DTO, so it makes sense to address both in a single Consultation.

However, we disagree with ESMA's statement in the Consultation that "this review of the CO and DTO is not the standard case of analysing whether a new product is fit for the CO and/or the DTO. Indeed, this exercise is about accompanying a transition where the products are broadly similar but with different benchmarks". As ESMA notes elsewhere in the Consultation, the transition away from EONIA and LIBOR to RFRs is not just a simple change of the name of the benchmarks being referenced – they are also used in a different manner. As a result, we would strongly support ESMA considering whether or not IRS referencing RFRs should become subject to the CO and/or DTO in light of the criteria set out under EMIR as if they were entirely new products, rather than viewing them as an alternative version of IRS referencing LIBORs.

We also welcome ESMA's confirmation that it has discussed this initiative with a number of authorities from third countries, and that it will continue to do so, in order to facilitate international convergence to the extent possible. As ESMA notes, the structural changes described in the Consultation have an international dimension and it is critical that there is international convergence where appropriate in order to prevent disruption to cross-border derivatives markets and to avoid an unlevel playing field.

<ESMA\_QUESTION\_RFRS\_3>

**Clearing obligation**

1. **: Do you agree with the assessment of the EMIR criteria and with the proposed classes (except for USD which is dealt with in a dedicated Question 5)? If not please detail how the assessment could differ and please also provide data and information to justify a different assessment.**

<ESMA\_QUESTION\_RFRS\_4>

We agree with ESMA's assessment that IRS referencing EONIA, GBP LIBOR and JPY LIBOR need to be removed from the scope of the clearing obligation.

With regard to the contracts to be added to the scope of the clearing obligation, while we agree with ESMA's assessment that there is not yet sufficient liquidity in the TONA OIS class for these contracts to be considered for the CO, ESMA should continue to observe the liquidity of the TONA OIS market.

However, we do not consider that any new classes of SONIA linked swaps (beyond those already subject to the clearing obligation) are sufficiently widely traded in the EU to fall within the CO at this stage. As mentioned above, given the global nature of derivatives markets, we consider that it would be appropriate for the EU to consider contracts for inclusion in the CO only where they are subject to a clearing mandate in the jurisdiction where the majority of trading takes place. While we are aware that the Bank of England is consulting on inclusion of SONIA OIS in the UK clearing obligation, we would ask ESMA to consider waiting for the outcome of that consultation before taking action. We would also ask ESMA to take into account the availability of relevant equivalence decisions for non-EU CCPs when considering the inclusion of any class of derivative in the CO, where the majority of trading and clearing activity in that class of derivative is in a third country. We are aware that the current equivalence decision for UK CCPs is time-limited, and unless this decision is extended this may have a significant impact on the ability of EU firms to satisfy the clearing obligation. <ESMA\_QUESTION\_RFRS\_4>

1. **: Will the transition regarding USD have made sufficient progress by this Autumn to decide on whether to maintain or remove USD LIBOR classes. Will there be sufficient liquidity to introduce SOFR OIS to the CO and for which maturity range? Please provide the relevant data and information to explain your assessment, in accordance with the EMIR framework.**

<ESMA\_QUESTION\_RFRS\_5>

We do not consider that there will be sufficient liquidity by this Autumn to introduce SOFR OIS to the clearing obligation for any maturity range.

However, we do consider that the transition regarding USD LIBOR will have made sufficient progress by this Autumn to support a decision to remove IRS referencing USD LIBOR from the CO. While we understand that the current intention is for the majority of tenors of USD LIBOR to continue to be published until June 2023, 1-week and 2-month USD LIBOR will cease to be published at the end of 2021. In addition, the strong recommendation from relevant regulators, including the European Commission, European Central Bank, EBA and ESMA has been that EU firms should cease to reference any tenor of USD LIBOR in new derivative contracts by the end of 2021. As a result, we consider that IRS referencing USD LIBOR should be treated in the same way as EONIA, GBP LIBOR or JPY LIBOR, and the efforts that have been and continue to be taken to transition away from these rates should be supported with a change in the scope of the CO and DTO.

In the event that USD LIBOR is kept within the scope of the CO and DTO, we would ask ESMA to monitor this closely as we would expect liquidity to decrease significantly in the very near future. If it is not possible to remove USD LIBOR from the CO and DTO on short notice then it may be necessary for ESMA to provide for regulatory forbearance or other relief if market participants are unable to clear in-scope USD LIBOR products or trade them on-venue.

However, we do not consider that there will yet be sufficient liquidity to introduce SOFR OIS to the CO. Based on ESMA's analysis in the Consultation, SOFR still represents only a fraction of the overall USD interest rate derivative activity. It is unlikely that this will change materially in the short term. In addition, we understand the CFTC will not decide until 2022[[1]](#footnote-2) on whether (or when) SOFR swaps should be brought within the clearing or trading obligations in the jurisdiction where the majority of SOFR swaps are traded, we would suggest the EU should not bring in such obligations unless and until the US mandates the same.

In the event that ESMA disagrees, and SOFR OIS is included in the CO, we would welcome confirmation from ESMA that legacy USD LIBOR contracts transitioning to SOFR will not become subject to the clearing obligation solely as a result of the trigger of fallback provisions within the contract or solely as a result of the operation of any legislation designed to address tough legacy LIBOR exposures. As ESMA notes in the Consultation, the transition away from EONIA and LIBOR to RFRs is not just a simple change of the name of the benchmarks being referenced – they are also used in a different manner. As a result, there is no guarantee that a contract that moves from referencing EONIA or LIBOR to referencing an RFR will in fact be clearable. If further amendments need to be made to these contracts in order to make them eligible for clearing or if it is not possible to make them eligible for clearing, this could potentially result in significant disruption to the LIBOR transition process.

Such a statement would be a logical extension of the statement made by the ESAs on 5 December 2019[[2]](#footnote-3) that amendments made to outstanding uncleared OTC derivative contracts for the sole purpose of introducing fall-backs should not create new obligations on these legacy contracts. It would also provide additional certainty and support to firms that are working to transition away from LIBOR.

If legacy USD LIBOR contracts transitioning to SOFR may become subject to the clearing obligation, we would welcome confirmation from ESMA that firms would not need to reapply (or otherwise notify their competent authority) in order to continue relying on any relevant intragroup exemptions.

<ESMA\_QUESTION\_RFRS\_5>

1. **: Do you agree with the proposed implementation of the changes? If not please provide details that could justify a different implementation.**

<ESMA\_QUESTION\_RFRS\_6>

We would welcome confirmation from ESMA that it will bear in mind the need for transitional provisions, particularly when introducing new contracts to the CO or DTO. Such transitional provisions could include phase-in provisions along the lines described below in more detail.

While EONIA and GBP / JPY LIBOR will cease to be published from the end of 2021, it is likely that there will no longer be sufficient liquidity for IRS referencing these rates to qualify for inclusion in the CO from a much earlier date. Several CCPs have already announced that they will cease clearing swaps that reference these rates after specified "big bang" dates in Q4 2021 (i.e., prior to the end of 2021). We would welcome confirmation that ESMA will take these "big bang" dates into account when setting the date for removal of contracts from the CO, as it may no longer be practically possible for firms to satisfy a mandatory CO in relation to these contracts after those dates.

We note that both the draft RTS amending the CO and DTO RTS are currently expressed to take effect from the later of 3 January 2022 or twenty days following publication in the OJ. ESMA may wish to consider developing two sets of amending RTS for the CO and the DTO, one removing IRS referencing EONIA and LIBOR and a second set introducing IRS referencing RFRs (in the case of the CO), coming into effect at a later date.

We note ESMA's statement in the Consultation that while the current Commission Delegated Regulations on the CO contain a phase-in, in the case of LIBOR transition counterparties have had to prepare for a while for the planned cessation of EONIA, EUR LIBOR, GBP LIBOR and JPY LIBOR at the end of 2021 so there is no need to introduce an additional phase-in in order to ensure an orderly and timely implementation of the obligation. We strongly disagree that no additional phase-in is required. Although counterparties have been preparing for LIBOR cessation for some time now, there is still a significant amount of work to be done before the end of 2021. If counterparties now also need to prepare for implementation of a new clearing obligation at the end of 2021 this will be an additional regulatory burden on market participants at a time when there is already potential for market disruption, despite the huge amount of work already undertaken by market participants.

We would suggest that ESMA consider an additional phase-in period of 6 months, with the effect that market participants are only required to comply with any new CO for transactions concluded from the end of the phase-in period. This additional phase-in period would allow firms to undertake the practical steps necessary to prepare for implementation, including client communications, internal system updates and amendments, co-ordination with relevant CCPs and trading venues and internal compliance steps (including staff training and updating relevant policies and procedures). We note that there is already a clear move to clear RFR linked products where possible[[3]](#footnote-4) and we do not consider that a delay in phase-in of the CO would have a negative impact on this. However, a phase-in period will help provide a breathing space to smaller market participants who may find that their resources are already stretched.

We would also welcome confirmation from ESMA that it will ensure that any changes made to the DTO are also reflected in the CO with effect from the same date, to avoid mismatches in either the timing for changes or in the scope of contracts subject to both the CO and DTO.

If it is not possible for changes to be made simultaneously to the CO and DTO, we would welcome confirmation from ESMA that it will issue a regulatory forbearance statement to ensure that firms are not required to continue to comply with obligations in adverse circumstances solely because the regulatory process means that the obligation cannot be removed in time.

We would also ask ESMA to confirm the proposed changes to the CO and DTO at the earliest possible opportunity, in order to help market participants prepare for implementation.

<ESMA\_QUESTION\_RFRS\_6>

**Derivatives trading obligation**

1. **: Do you agree with the proposal to not include OIS referencing €STR, SONIA nor SOFR to the DTO at this point in time? In case you disagree with ESMA’s proposal, please justify and support your assessment with qualitative and quantitative data.**

<ESMA\_QUESTION\_RFRS\_7>

Yes, we strongly agree with the proposal to not include OIS referencing €STR, SONIA or SOFR to the DTO at this point in time, in light of ESMA's analysis regarding liquidity on EU or equivalent non-EU venues.

<ESMA\_QUESTION\_RFRS\_7>

1. **: Do you consider that IRS referencing USD LIBOR should continue to be subject to the DTO?**

<ESMA\_QUESTION\_RFRS\_8>

Similarly to the CO, as explained above, we do not consider that IRS referencing USD LIBOR should continue to be subject to the DTO.

While we understand that the current intention is for the majority of tenors of USD LIBOR to continue to be published until June 2023, 1-week and 2-month USD LIBOR will cease to be published at the end of 2021. In addition, the strong recommendation from relevant regulators, including the European Commission, European Central Bank, EBA and ESMA has been that EU firms should cease to reference any tenor of USD LIBOR in new derivative contracts by the end of 2021[[4]](#footnote-5). As a result, we consider that IRS referencing USD LIBOR should be treated in the same way as EONIA, GBP LIBOR or JPY LIBOR, and the efforts that have been and continue to be taken to transition away from these rates should be supported with a change in the scope of the CO and DTO.

<ESMA\_QUESTION\_RFRS\_8>

**Cost Benefit Analysis**

1. **: Are there other elements that should be taken into account and that would impact the outcome of the cost-benefit analysis? Please provide quantitative and qualitative details.**

<ESMA\_QUESTION\_RFRS\_9>

N/A.

<ESMA\_QUESTION\_RFRS\_9>

1. <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement071321> [↑](#footnote-ref-2)
2. <https://www.esma.europa.eu/sites/default/files/library/esas_2019_19_statement_on_the_introduction_of_fallbacks_in_otc_derivative_contracts_to_increase_contract_robustness.pdf> [↑](#footnote-ref-3)
3. ESMA states in the Consultation (at p22) that "… between 80% and 100% of notional in SOFR, SONIA and TONA is currently cleared". However, a significantly smaller percentage of these products are venue-traded (with the report at the following link indicating that only around 50% of GBP IRS not currently subject to a trading obligation are traded on-venue: <https://ihsmarkit.com/research-analysis/Brexit-Global-OTC-IRS-markets-Q1-review.html>). This reinforces the point that only highly liquid instruments should be made subject to mandatory trading, given the risk of damage to the liquidity of less liquid instruments if a DTO is imposed too early. [↑](#footnote-ref-4)
4. <https://www.esma.europa.eu/sites/default/files/library/joint_public_statement_usd_libor.pdf>; see also para 4 of the Introduction to the Consultation [↑](#footnote-ref-5)